LIBRARY
SUPREME COURT, U. S.

FILED
JAN 17 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 954

STEPHEN A. CINO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ABRAHAM GLASSER
52 Eighth Avenue
New York, New York 10014

PETER L. PARRINO
778 Ellicott Square Building
Buffalo, New York

Attorneys for Petitioner
Stephen A. Cino

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	6
STATEMENT OF THE CASE	6
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	24
APPENDIX:	
A—Opinion of Court of Appeals	1a
B—Judgment of Court of Appeals	18a
C—Statutory Provisions Involved	20a
D—Opinion of District Judge (November 30, 1967)	23a
E—Relevant Excerpts from Opinion of District Judge (October 3, 1967)	25a
F—Order (By Panel of Court of Appeals) Denying Petition for Rehearing (Entered October 14, 1968)	26a
G—Order and Memorandum of Court of Appeals Denying Petitions for Rehearing En Banc (Entered December 18, 1968)	27a

Cases Cited

Arnold v. United States, 94 F. 2d 499 (C. C. A. 10 1938)	17

PAGE

Bruton v. United States, 391 U. S. 123 ..... 3, 4

Caminetti v. United States, 242 U. S. 470 16

Fain v. United States, 209 Fed. 525 (C. C. A. 8 1913) 17

Fiswick v. United States, 329 U. S. 211 22

Freed v. United States, 266 Fed. 1012 (D. C. App. 1920) 17

Gordon v. United States, 164 F. 2d 855 (C. C. A. 6 1947), cert. denied 333 U. S. 862 17

Holmgren v. United States, 217 U. S. 509 4

Johnson v. Bennett, October Term 1968, No. 32 5

Katz v. United States, 389 U. S. 347 21

Lee v. Florida, 392 U. S. 378 21

Lett v. United States, 15 F. 2d 686 (C. C. A. 8 1926) 17

Lutwak v. United States, 344 U. S. 604 22

Masters v. United States, 351 F. 2d 105 (C. A. 8 1965) 17

McGinnis v. United States, 256 Fed. 621 (C. C. A. 2 1919) 17

McMillen v. United States, 386 F. 2d 29 (C. A. 1 1967) 17

Morenkow v. United States, 276 Fed. 293 (C. C. A. 6 1921) 17

Osborne v. United States, 351 F. 2d 111 (C. A. 8 1965) 17

Rossi v. United States, 15 F. 2d 686 (C. C. A. 8 1926) 17

Rudner v. United States, 281 Fed. 516 (C. C. A. 6 1922) 17

PAGE

Smith v. United States, 224 F. 2d 58 (C. A. 5 1955) 17

Stanley v. United States, 245 F. 2d 427 (C. A. 6 1957) 17

Stewart v. United States, 131 F. 2d 624 (C. C. A. 5 1942), cert. denied 318 U. S. 779..... 17

Sykes v. United States, 204 Fed. 909 (C. C. A. 8 1913) 17

Temporary Commission On Revision Of The Penal Law And Criminal Code, Proposed New York

Thompson v. Louisville, 363 U. S. 199..... 5

United States v. Caci, et al., 401 F. 2d 664..... 1

United States v. DeSisto, 329 F. 2d 929 (C. A. 2, 1964), cert. denied, 377 U. S. 979..... 9, 10

United States v. Grieco, 261 F. 2d 414, cert. denied 359 U. S. 907..... 20

United States v. Local 807, Teamsters Union, 315 U. S. 521..... 11

United States v. Murphy, 253 Fed. 404 (N. D. N. Y. 1918) 17

Valdez v. United States, 244 U. S. 432..... 16

Wagman v. United States, 269 Fed. 568 (C. C. A. 6 1920) 17

United States Constitution Cited

Fourth Amendment 4

Fifth Amendment 3

Sixth Amendment 4

Eighth Amendment 6

PAGE

Statutes Cited

N. Y. Code Crim. Proc.:
Sec. 399 19

48 Stat. 979, 980 (Anti-Racketeering Act of 1934)... 11

18 U.S.C.:

Sec. 371 6

Sec. 1951 (Hobbs Act)..... 3

Sec. 2314 6

28 U.S.C.:

Sec. 1254(1) 2

Other Authorities Cited

Criminal Procedure Law, 1968 Study Bill And Criminal Procedure Law, Study Bill and Commission Report:

Page 27 (1968) 19

Page 72 (1967) 19

Lawyers Edition Report (61 L. Ed. 1242)..... 17

Orfield, Corroboration Of Accomplice Testimony In Federal Criminal Cases, 9 Villanova Law Review,

Pages 15 et seq. (1963)..... 19

Page 35 19

Wigmore On Evidence (3d Ed.) 15

Secs. 2056-2059 15

Page 93, 1964 Pocket Supp. 19

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No.

STEPHEN A. CINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Stephen A. Cino, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on July 30, 1968.

Opinions Below

The opinion of the Court of Appeals printed in Appendix A, hereto, *infra,* is reported in *United States* v. *Caci, et al.,* 401 F. 2d 664. The unreported opinion of United States District Judge John O. Henderson, W.D.N.Y., dated October 24, 1967, relating to the jury selection issue, is printed in the companion petition for certiorari herein for

petitioner Frederico G. Randaccio (No. 715), at pp. 50-51. The unreported opinion of District Judge Henderson, dated November 30, 1967 (R. 2813-2815), relating to electronic monitoring, is printed in appendix D hereto, *infra*. Relevant excerpts from the unreported opinion of District Judge Henderson, dated October 3, 1967, relating to electronic monitoring and search-seizure leads derived therefrom (R. 2658-2659) are printed in appendix E hereto, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on July 30, 1968 (Appendix B hereto, *infra*). By respective orders of Mr. Justice Harlan petitioner Cino's time within which to file his petition for certiorari herein was extended to September 28, 1968 and then to December 7, 1968. During the period of the latter extensions of time petitions for re-hearing and re-hearing *en banc* were pending in the Court of Appeals, Cino being a party thereto. An order by the panel of the Court below denying the petitions for re-hearing was entered October 14, 1968 (Appendix F hereto, *infra*). But the petitions for re-hearing *en banc* in the Court below continued undecided until December 18, 1968, when an order was entered denying the petitions for re-hearing *en banc*, Circuit Judge Irving R. Kaufman dissenting (Appendix G hereto, infra). This petition for certiorari is submitted as being timely on the basis of the thirty days running from the date of denial of the petitions for re-hearing *en banc* in the Court below (December 18, 1968).* The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

---

* See petitioner Cino's application to Mr. Justice Harlan served and filed December 6, 1968, and the letter from the Clerk of this Court to Abraham Glasser dated December 11, 1968.

Questions Presented

1. Does the Hobbs Act (18 U.S.C. §1951) support this prosecution for conspiracy to commit robbery which would affect commerce (count 1 of the indictment), in view of the absence of any element of racketeering, extortion or "highway robbery"? Is not such application of the Hobbs Act an unconstitutional invasion of the police power of the States and of substantive due process under the Fifth Amendment?

2. Supplementing question 1, does not this Hobbs Act prosecution constitute an improper and unconstitutional aggrandizement of the Federal commerce power, in view of the extreme attenuation of the Federal power to prosecute for crime thereby created, especially since no robbery was ever carried out in effectuation of the conspiracy charge?

3. Supplementing questions 1 and 2, are not the aggrandizement and the attenuation of Federal power, exemplified in this case, a threat to our *Federalistic* constitutional system which this Court should examine at this particular juncture when all-important constitutional opportunities are going to be needed for the purpose of flexibly adapting the structures and the facilities of constitutional power in this country for constructive social-governmental solutions of the problems of racial discord and of excessive governmental centralism—problems whose solution, that is, may well have to depend upon a creative constitutional open-mindedness in devising larger scope for regional, state or local (or even ethnically "separatist") authorities in the use of governmental or *quasi*-governmental power?

4. Was petitioner Cino denied a fair due process trial by the circumstances surrounding the use of uncorroborated accomplice testimony? Does *Bruton* v. *United*

States, 391 U. S. 123, favor a re-examination of the peculiar trend of the Federal case law of recent decades—a trend against which there is authoritative current judicial ferment—whereby the "better practice" rule of *Holmgren* v. *United States,* 217 U. S. 509, 523-524 (that jury instructions should include a requirement of corroboration of accomplice testimony) has practically become reduced to a dead letter by what appears to be sheer judicial inadvertence in the decisions of the lower Courts?

5. Was petitioner Cino denied his constitutional right to a fair and impartial jury under the Sixth Amendment, and under Federal statutory and judicial standards, by reason of the methods used in this case to obtain the names of prosepective trial jurors and to compile the trial jury list?

6. Was petitioner Cino denied a fair due process trial and a fair jury trial (Fifth and Sixth Amendments) by the refusal of relief, in both of the Courts below, concerning inflammatory prejudicial publicity in local radio broadcasts which denounced the defendants as members of the "Cosa Nostra" during the evening and morning immediately preceding the submission of the case to the jury?

7. Was petitioner Cino denied his Fourth Amendment rights by electronic monitoring—a trespassory room bug involving co-petitioner Randaccio, and a telephone interception involving co-petitioner Sorgi—which produced investigative leads, and (in the case of the telephone interception) produced vital prosecutive evidence consisting of master keys to the Beverly Hilton Hotel in Los Angeles, the scene of the alleged conspiracy-intended robberies?

8. Was petitioner Cino denied a fair due process trial by the refusal of the trial Court to instruct the jury

with respect to the alibi defense of the co-petitioner Randaccio, and is not our contention in this regard aided by this Court's decision of December 16, 1968 in *Johnson* v. *Bennett*, October Term 1968, No. 32? If there was error in this refusal to instruct the jury, does not the prejudice directly affect petitioner Cino, since the Randaccio alibi, if believed would fatally impeach the entire operative testimony of the sole accusing witness (the accomplice Calabrese) as to the alleged inception and organization of the conspiracy charged in both counts of the indictment?

9. Was petitioner Cino denied a fair due process trial by the reception in evidence of post-conspiracy hearsay testimony from the accomplice witness Calabrese?

10. Was petitioner Cino denied a fair due process trial, and did the Government fail to prove an essential element of the case under count one of the indictment, in view of the fact that the proof adduced to establish the interstate commerce character of certain checks which allegedly would have been stolen in pursuance of the conspiracy if the robbery of the armored car messenger had ever happened (which it never did), consisted solely of "proof" that on some (not all) of certain allegedly relevant days in February 1965 such checks were included in the allegedly potential "loot" and that *statistically* such checks were customarily so included? In this criminal prosecution does not such "proof" fail under the standards of the "no-evidence" rule of *Thompson* v. *Louisville*, 363 U. S. 199, and indeed does it not fail for sheer failure to prove the requisite interstate commerce *corpus delicti*? And is not the point here urged fortified by the circumstance that the alleged conspiracy remained at all times in an amorphous condition as regards the question of *when* the conspirators might or might not undertake to carry out the robbery of the armored car messenger?

11. In view of the total circumstances of the case, is not the imposition on petitioner Cino of a jail sentence of twenty years cruel and unusual punishment (Eighth Amendment)?

12. Was the evidence insufficient for submission to the jury or for conviction?

13. Cumulatively, do the errors and violations of law here involved require reversal of the conviction on grounds of due process of law?

14. Petitioner Cino joins in the questions presented in the respective petitions of the co-petitioners herein insofar as applicable to his case.

Constitutional and Statutory Provisions Involved

The case involves all relevant provisions of the United States Constitution which pertain to the division of "commerce" and "police" powers between the States and the United States, and to reservation of powers of the States and the People.

It also involves the Fourth Amendment (search and seizure), Fifth Amendment (due process), Sixth Amendment (jury trial), and Eighth Amendment (cruel and unusual punishment).

The case also involves 18 U.S.C. §§371, 1951, and 2314; these statutory provisions are printed in Appendix C hereto, *infra.*

Statement of the Case

Petitioner Cino was convicted, after a jury trial, in the United States District Court for the Western District of New York (Henderson, D. J.), on one count of conspiracy to commit a robbery which would affect commerce in violation of 18 U.S.C. §1951 (Count 1), and one count of conspiracy to transport stolen goods in interstate commerce in violation of 18 U.S.C. §§371 and

2314 (Count 2). He was sentenced to twenty years on the first count and five years on the second count, to run concurrently.

This petition for *certiorari* is companion with the petitions of four other defendants who were convicted in the same trial (Caci, No. 720; Natarelli, No. 474; Randaccio, No. 715; Sorgi, No. 1112 Misc.). To avoid unnecessary repetition, we shall keep our statement of the case short.

Cino's twenty year jail sentence may fairly be said to be the result, literally, of testimony by a single accomplice witness, Pascal Calabrese. We would thus emphasize at the outset that there is no corroboration of Calabrese's testimony linking Cino to this case, nor is there any other proof inculpating Cino except Calabrese's uncorroborated testimony. And Calabrese is the classic "accomplice witness", *i.e.*, a witness of destructively impeached credibility, the usual self-confessed "accomplice" chronic prevaricator (*e.g.*, 377-387, 420-421, 439-449, 457, 459-461).

The indictment charged in the first count that petitioners conspired to rob an armored car messenger at a Los Angeles hotel (the Beverly Hilton), and in the second count that they conspired to transport in interstate commerce proceeds from the sale of jewelry which they planned to steal from a wealthy guest (Mrs. McCune) at the hotel. Neither of the planned robberies was executed because the guest did not come to the hotel as expected; the robbery of the guest (Mrs. McCune) had been set in the alleged conspiratorial plan as prerequisite, or as being in a time priority, to the robbery of the armored car messenger.

Calabrese testified that on December 29, 1964 he had robbed the Buffalo City Hall of a large amount of money, had then gone into hiding, and had been contacted

on February 4, 1965 by the within petitioner Cino who told him that Natarelli and Randaccio wanted to meet with him to have him carry out certain robberies out of town. The next evening (February 5) Calabrese went to Natarelli's house where Cino and Natarelli were present; Randaccio arrived about a half hour later, and then Natarelli and Randaccio gave Calabrese the details of the planned robberies, which were to take place at the Beverly Hilton Hotel in Los Angeles. Calabrese was to be helped in Los Angeles by the within co-petitioner Caci, and by the within co-petitioner Sorgi who was in charge of security at the hotel. Cino also was to go to Los Angeles to help Calabrese. First, Calabrese was to rob Mrs. Walker McCune of jewelry worth about $400,000. After that he was to rob the armored car messenger who picked up the hotel's daily receipts. Cino was to take the stolen jewelry to a relative in San Francisco who would "fence" it, and then Cino would bring the proceeds back to Buffalo. Calabrese went to Los Angeles, arriving there February 7, 1965, Caci meeting him at the airport. Cino came to Los Angeles February 10. Caci, Calabrese and Cino were in varying degrees of contact with Sorgi at Los Angeles. Sorgi instructed Calabrese as to the hotel layout, showed him around the hotel, assured him of Sorgi's ability to protect the planned robbery actions through his (Sorgi's) position as the hotel's security officer, and all of the alleged conspirators awaited the arrival of Mrs. McCune at the hotel; she was expected to arrive by February 12. However, Mrs. McCune became ill and did not go to the Los Angeles hotel. Caci, Calabrese, Cino and Sorgi kept in contact over the next several days as they kept waiting or hoping for Mrs. McCune's arrival. However, on February 17, Mrs. McCune still not having arrived, the alleged conspiracy became thwarted when word was received from Buffalo that the police were looking for Cal-

abrese in connection with the City Hall robbery; at this, the alleged conspirators scattered, Cino leaving Los Angeles for Buffalo on February 17, and Calabrese leaving Detroit on February 18. On February 22 Calabrese surrendered himself to the authorities at Buffalo, was released on bail that afternoon, and thereafter met one or more times with Randaccio and Natarelli; these latter meetings resulted in indefinite postponement or termination of the Los Angeles project.

While the Government introduced copious and varied proof corroborating aspects of Calabrese's testimony, none of such corroboration touched in any way the matter of tying Cino into the case; the corroboration consisted of such items as hotel or apartment records fixing Calabrese's own location at pertinent times, etc. As we above suggested, Cino's alleged involvement in this case rests solely on uncorroborated testimony of the accomplice witness Calabrese.

The Government's proofs to show the element of interstate commerce are noted in our "Reasons", *infra*.

The United States Court of Appeals for the Second Circuit affirmed the convictions (Appendix A hereto, *infra*). Petitions for re-hearing and for re-hearing *en banc* were denied—these petitions involved issues as to jury-selection procedure in the Western District of New York (details *infra*).

Reasons for Granting the Writ

I.

This is apparently the first prosecution under 18 U.S.C. §1951 (Hobbs Act) in which the issue of applicability of this statute to ordinary "Common law" robbery has been litigated and judicially considered and decided. The only "precedent" invoked by the court below is *United States*

v. *DeSisto,* 329 F. 2d 929 (C. A. 2, 1964), cert. denied 377 U. S. 979, involving the hijacking of a truck with no elements of labor racketeering or extortion being present—as is also the case here. But in *DeSisto* the question of such statutory coverage of "robbery" was not raised or expressly decided. This issue of statutory coverage was, apparently, assumed by all concerned in *DeSisto* as not being an issue.

The instant case, then, is a case of first impression on this very important question of whether the Hobbs Act was intended by Congress to put the Federal law enforcement Establishment into the field of prosecuting "robbers" all over the United States whenever an "interstate commerce" "handle" can be ratiocinated.

In referring to this question as being a very important question, we are sure we do not exaggerate. In its impingement upon basic constitutional choices, this question takes one into what is probably the single most persistent (and perhaps also the single most fundamental) area of constitutional debate from the earliest times of this Nation down to the present time. For, this is a case that touches, or can touch, in a decisive *historic* degree, the whole dynamic of our system of *constitutionally limited* governmental power of a *federalistic* nature in this country.

The American doctrine of constitutional limitations has a unique two-fold character. Not only do we have specific constitutional limitations of a "Bill of Rights" character, but we also have the whole built-in system (in our Constitution) of what Professor Corwin termed "dual Federalism". It is one unhappy sign of the temper of our times that a lawyer or a Judge may nowadays hesitate to incur the risk of being thought banal if he were to refer also, in a discourse like the present one, to the old-fashioned phrase "checks and balances."

The perspectives of our constitutional history, in which expansion of the Federal commerce power is a true monument of the John Marshall Court and of the Court's achievements in the aftermath of the Depression of the 1930's, are not lost upon present counsel. But present counsel would also venture to suggest that to all of us, who enjoy this perspective, it is proper to ask, in the face of a Federal criminal prosecution of the present kind, "Upon what meat doth this our Commerce power feed that it hath grown so great"?

When Congress enacted the Hobbs Act in 1946 (18 U.S.C. §1951), supplanting the Anti-Racketeering Act of 1934 (48 Stat. 979, 980), there can be no doubt of the object at which Congress was really aiming. Congress was not aiming at a plenary take-over of the police powers of the States for the punishing of any and all "robbers" whose "loot" (or conspiracy-intended loot) would or might in some way "affect" "commerce". The Court below (Appendix A hereto, *infra*) has cited various passages from the legislative history of the Hobbs Act. *Inter alia,* in its survey of that legislative history, the Court below referred to the House Judiciary Committee Report of 1945 (*U. S. Code Congressional Service,* pp. 1360-1370 (1946)), and the Court below mentioned that the Hobbs Act was passed for the purpose of over-ruling *United States* v. *Local 807, Teamsters Union,* 315 U. S. 521, involving certain labor union interferences in interstate trucking activities. The last mentioned House Committee Report cannot be read as having been aimed at anything except these "racketeering" types of interference (see especially pp. 1369-1370, *U. S. Code Cong. Serv., loc. cit.*).

It will not do to say, as the Government and the Court below maintain in the present case, that the Hobbs Act simply is to be read "on its face", and that the language of that Act "on its face" unqualifiedly puts the Federal

Government into the prosecutive business of punishing any and all "robbers" who "affect" or may "affect" "commerce". This will not do because such an "on-the-face" reading of this legislation, or of any similar Federal legislation, instantly collides or may collide with our Federalistic distribution of powers between the State and National Governments. In other words, the very existence of our constitutional system of dual Federalism imports, *eo ipso*, into this category of federal statutory interpretation, an intrinsic element of *constitutionally founded doubt or ambiguity*. Putting it in another way, there is so to say an ever-abiding constitutional "presumption" against assertions of Federal legislative power which trench too egregiously upon the reserved legislative domain of the States under our Federal system. Or, putting it in still another way, the problem of statutory interpretation in a case like this one is not satisfied by merely "interpreting" a term such as "robbery" plus a term such as "commerce" (or "affecting commerce"). On the contrary, the problem of statutory interpretation in such a case requires that one bear constantly in mind the underlying and controlling test of Federalism.

Nothing in the constitutional history of the commerce clause supports the use of the Federal power in a case like the present one. Was Federal prosecution of the present defendants needed or justified in the interest of a "uniform national rule" for regulation of "commerce"? Was this one particular band of alleged "robbers" (of the ordinary sort) so plainly beyond the reach of State punitive facilities, are such alleged "robber" bands generally throughout the country so beyond such State reach, that the tricky and specious processes of Federal aggrandizement here involved have to be constitutionally endured?

Nor, as we suggested in our Questions Presented, is the question here solely a question of the Commerce Power or of Federalism. The question additionally is one of *sub-*

stantive due process. As above said, our system prizes itself as being one of constitutional limitations. The dual form of our constitutional limitations vindicates the claims of both individual citizens and of the Federally component State sovereignities. When the Federal Government wants to take over a function tradititionally reserved to the States—here, the prosecution of "robbery"—is it not an intrinsic part of the constitutional rights of the individual citizen that he shall be allowed to challenge the assertion of Federal power over him on the ground that the Federal Government does not possess the particular power because it belongs to the States and has been forbidden to the Federal Government—that is, there is in such a case a constitutional limitation against the Federal Government's assertion of the power, and there is a concomitant individual right to challenge the assertion. By this same reasoning, our analysis comes to the topic of *substantive due process.* The familiar theorem for the substantive due process inquiry goes thus:—Does there exist at all a power to legislate concerning a given subject matter, and if so, has the legislative body chosen means reasonably adapted to the accomplishment of the permitted legislative object? Apply that test here. First, does there exist at all a Federal power to invade the traditionally State-reserved power to punish "robbers"? Concededly, there is such a Federal power, generically speaking, in the *proper* "interstate commerce" area or in other areas of explicit Federal purview or of "necessary and proper" incidental Federal purview. But what of the instant exercise of such Federal power, under the Hobbs Act as here applied? Does the instant legislation, as here applied, comply with the substantive due process test that the legislative means shall be reasonably adapted to the accomplishment of the permitted legislative object? We would be most intrigued to see a rationally convincing argument from the Government in support of the idea that

it is so plainly "necessary and proper" for Federal criminal prosecutors and Federal Courts to pursue alleged "robbers" of the instant type that the traditional State purview in such cases must give way as a matter of "substantive due process".

In our Questions Presented, *supra,* we suggested that the seemingly infinite aggrandizement and proliferation of the Federal Commerce-Clause-based power to punish ordinary "State" crime poses a great threat to the whole future civic or social safety of this country in the present era. Negro groups are passionately insisting, right now, on one or another form of separatism; and the white community is hearkening to these proposals with utmost earnestness. Elsewhere through our social fabric today massive agitations are underway, and are being earnestly considered by influential elements in the society, with a view to one or another kind of redistribution of "power" or "authority" to satisfy autonomous strivings of a regional, or local, or other nature. Students of the history of ancient civilizations which broke down after similar processes of stress and tension may well be concerned right now about the ability of our American society to find the needed adaptive devices for healthy survival as a society and as a nation. One of the most useful abilities that the genius of this country has evolved for meeting this kind of task is the institution that we call Judicial Review. In the coming period there is a strong likelihood that the Courts may face litigation aimed at a curbing of the powers of the Federal Government, in the interest of decentralization of governmental power. This case of ours which is now before this Court, this unattractive case of an alleged band of ordinary conspiratorial thieves, affords an opportune occasion for this Court to speak a message that may prepare for the soothing of unimaginably destructive storms of social strife in the soon-looming future.

II

The Court below treated our contention concerning accomplice testimony as presenting the issue of "the sufficiency of the evidence, * * * on the ground that the uncorroborated testimony of an accomplice is insufficient to support a verdict" (Appendix A hereto, *infra*, p. 9a). In response to this contention of ours the Court below said (*ibid.*):

> "Although Calabrese's testimony was of crucial importance, it did not stand alone; as noted above, it was corroborated in several respects. Moreover, even if his testimony were not corroborated, it would be sufficient to support the convictions. See *Caminetti* v. *United States*, 242 U. S. 470, 495 (1917); *United States* v. *Agueci*, 310 F. 2d 817, 833 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963)."

First, as seen, although Calabrese's testimony "was corroborated in several respects", undisputedly it was not corroborated *at all* as regards linking Cino personally in any way with the commission of the crimes charged (see *Wigmore On Evidence* (3d Ed.), §2059, emphasizing the need to identify a particular defendant with participation in the crime).

Petitioner Cino was entitled to ask that the testimony of the accomplice witness be weighted in scales of a more traditional caliber of justice than that which seems to have become the fashion in the lower Federal courts under the supposed "rule" that accomplice testimony need never be corroborated.

This supposed "rule", as we are about to show, is nothing more nor less than the result of an evolutionary process of misapprehension by various lower Federal courts who have misread the controlling decisions of this Court

on the subject. The true and correct (and the just) Federal rule, we shall show, is not that the dispensing with any requirement of corroboration of accomplice testimony is a "rule" of invariable application, but that it is the "better practice" to require corroboration. The circumstances of the present case called for the use of such "better practice" here.

We are not urging the Court to depart in any precedent-shattering way from what is commonly regarded as being the established Federal rule that corroboration of accomplice testimony is unnecessary. What we are asking the Court to do is to rule, on the basis of the decisions noted *infra*, that in our particular case justice, fairness and sound judicial discretion required an instruction to the Jury that *none* of the accomplice testimony should be believed unless it was supported by *proper* corroboration.

Holmgren v. *United States*, 217 U. S. 509, 523-524 states that "It is undoubtedly the better practice for Courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them". This *Holmgren* language was by the unanimous Court, and it has never since been critized, disparaged or departed from in any doctrinal sense by the Court in any other decision, including *Caminetti* v. *United States*, 242 U. S. 470, 495-496, which is so often cited (uncritically, we must say) for the proposition that corroboration of accomplice testimony is *never* required in Federal criminal prosecutions. *Caminetti* expressly noted the *Holmgren* rule and said, "This is so", going on to add merely that "There is no absolute rule of law preventing conviction on the testimony of accomplices if juries believe them" (242 U. S. at 495). Indeed about six months after *Caminetti* the Court in *Valdez* v. *United States*, 244 U. S. 432, expressly undertook to examine whether there had been corroboration of the accomplice

testimony (at pp. 449-442). The *Valdez* case arose in the then Territory of the Phillippine Islands; from the report of the decision in *Valdez,* and from the description of the arguments and briefs of counsel in the Lawyers Edition Report (61 L. Ed. 1242 et seq.) it does not appear that the case involved any statutory or constitutional provision applicable to the Phillippines Territory which would have expressly required corroboration of accomplice testimony.

While the overwhelming majority of the decisions in the lower Federal Courts have ignored the "better practice" rule of *Holmgren* in recent decades, that rule has from time to time shown a continuing vitality. E.G., *Sykes* v. *United States,* 204 Fed. 909, 913 (C.C.A. 8 1913); *Fain* v. *United States,* 209 Fed. 525, 533 (C.C.A. 8 1913; *United States* v. *Murphy,* 253 Fed. 404, 406 (N.D.N.Y. 1918); *McGinnis* v. *United States,* 256 Fed. 621, 626 (C.C.A. 2 1919); *Freed* v. *United States,* 266 Fed. 1012, 1014-1016 (D.C. App. 1920); *Wagman* v. *United States,* 269 Fed. 568 (C.C.A. 6 1920) *Morenkow* v. *United States,* 276 Fed. 293 294 (C. C. A. 6 1921); *Rudner* v. *United States,* 281 Fed. 516, 521 (C. C. A. 6 1922); *Rossi* v. *United States,* 9 F. 2d 362, (C. C. A. 8 1925); *Lett* v. *United States,* 15 F. 2d 686, 689 (C. C. A. 8 1926). Cf. also the various indications of dissatisfaction with the non-corroboration rule in, e.g., *Arnold* v. *United States,* 94 F. 2d 499, 501, 506 (C. C. A. 10 1938); *Stewart* v. *United States,* 131 F. 2d 624 (C. C. A. 5 1942), cert. denied 318 U. S. 779; *Gordon* v. *United States,* 164 F. 2d 855 (C. C. A. 6 1947), cert. denied 333 U. S. 862; *Smith* v. *United States,* 224 F. 2d 58 (C. A. 5 1955); *Stanley* v. *United States,* 245 F. 2d 427 (C. A. 6 1957); *Osborne* v. *United States,* 351 F. 2d 111 (C. A. 8 1965); *Masters* v. *United States,* 351 F. 2d 105 (C. A. 8 1965).

Of the cases cited in the preceding paragraph we especially invite attention to the language of the Eighth Circuit in the *Sykes* case *supra;* and to the *Murphy* case from

the Northern District of New York, *supra.* In the latter case, the Court, treating the *Holmgren* rule as being still controlling, and evidently referring to the *Caminetti* case, and to similar decisions of the lower Federal courts, said (253 Fed. at 406) that those cases do "not hold, as contended for by counsel, that corroboration of an accomplice is not necessary, but they do hold that a conviction may be had without corroboration. A distinct difference. The principles enunciated in these decisions unquestionably apply to the testimony of an accomplice who has testified in a case and leaves the witness stand unimpeached." But when the accomplice witness has been impeached, the *Murphy* Court said, "The Supreme Court, in such instances, as declared in the *Holmgren* case, *supra,* holds that a trial court should caution juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such evidence * * *."

We submit that this stalwart and discerning language written in 1918 in the *Murphy* case, *supra,* embodies the correct historical and traditional perspective of the Federal accomplice-corroboration rule, and that it states a theme which this Court should now restate.

We disparagingly referred above to the post-*Caminetti* decisions of many of the lower Federal Courts on the issue of corroboration of accomplice testimony. We (counsel here) are not alone in expressing concern or dissatisfaction in this regard. See, especially, *McMillen* v. *United States,* 386 F. 2d 29, 32-36 (C. A. 1, 1967). Even *Wigmore's* treatment, which (as is to be expected) is not strongly sympathetic to the corroboration requirement (which Wigmore points out exists in nearly half of the American States), leaves the reader with a deep sense of disturbance over the unfairness of any unqualified rule dispensing with the need for corroboration. *Wigmore On*

Evidence (3d Ed.) §§2056-2059. Of similar mixed viewpoint and purport is *Orfield, Corroboration Of Accomplice Testimony In Federal Criminal Cases,* 9 Villanova Law Review, pp. 15 et seq. (1963).

The presently immediate importance, indeed urgency, of an undertaking by this Court by way of re-examination of the Federal accomplice-corroboration rule, is illustrated in what is now going on in the State of New York, one of the statutory corroboration-requirement States (N. Y. Code Crim. Proc. §399), where a Law Revision Commission has been recommending repeatedly for the last several years that the corroboration requirement be dropped. See *Temporary Commission On Revision Of The Penal Law And Criminal Code, Proposed New York Criminal Procedure Law, 1968 Study Bill And Commission Report, published by Edward Thompson Co.,* at p. 27; and the similar publication for the year 1967, at p. 72. Indeed, since at least the late 1930's this same New York Law Revision Commission (or predecessor bodies) has been pushing for such a repeal, but thus far unsuccessfully (*Orfield, Op. Cit. supra,* at p. 35). And, interestingly, during this same period two additional State jurisdictions, Alaska and Arizona, have adopted the corroboration requirement (*Wigmore Op. Cit. supra,* 1964 Pocket Supp. p. 93).

Furthermore, we respectfully find in this Court's reasoning in *Bruton* v. *United States,* 391 U. S. 123, persuasive doctrinal expressions disfavoring the reliability of uncorroborated accomplice testimony, or at least strong suggestions to that effect.

Taking the circumstances of the present case as a whole, the recent ferment among Courts and legal scholars above mentioned, the always implicitly acknowledged sense of dissatisfaction with the fairness of the non-corroboration alternative as above noted, and the language of *Bruton*

just referred to, we earnestly request the Court to utilize this case as a vehicle for a comprehensive re-examination of the prevailing Federal Court rule that corroboration of accomplice testimony is never required.

III

The question of the constitutional fairness of the jury-selection procedure in this case was the subject matter of the petitions for rehearing and rehearing *en banc* in the Court below. As seen, the Panel denied rehearing, and the *en banc* application was also denied, but with a dissent by Circuit Judge Irving R. Kaufman (appendix G hereto, *infra*).

In view of the full treatment of this subject contained in the companion petition of Randaccio (No. 715) we respectfully adopt that presentation, plus relying on the benefit which may accrue to our position on this point by virtue of Judge Kaufman's dissent from the denial of the petitions for rehearing *en banc* in the Court below.

IV

We are advised that the companion petition herein for Caci (No. 720) argues the issue of prejudicial publicity occasioned by local radio broadcasts on the evening and morning immediately preceding the submission of the case to the jury herein. We respectfully adopt Caci's presentation, and add that, as stated in *United States* v. *Grieco*, 261 F. 2d 414, cert. denied 359 U. S. 907, while "* * * it was long the rule that a Court would refuse to inquire in any way whatever as to what had occurred during the jury's deliberations * * * the rigidity of this doctrine has been relaxed * * *" (citing decisions of this Court).

V

There were two separate electronic monitorings in this case. One involved a trespassory bugging of a private home where co-petitioner Randaccio was present (described in the Government's Brief In Opposition to the companion petition herein for Natarelli, no. 474, at pp. 6-7). The other involved interception of a telephone conversation involving co-petitioner Sorgi, which resulted in the Government's obtaining one of the most damaging single items of evidence in this prosecution, namely, Beverly Hilton Hotel master keys found in the possession of co-petitioner Caci. We are advised that the within companion petitions for Caci (no. 720) and Sorgi (no. 1112 Misc.) treat this subject, and we respectfully adopt those presentations, adding that we particularly rely on *Osborn* v. *United States,* 385 U. S. 323; *Katz* v. *United States,* 389 U. S. 347; and *Lee* v. *Florida,* 392 U. S. 378.

VI

On the issue of the trial Court's refusal to instruct as to the Randaccio defense alibi, we respectfully rest on the presentation in the herein companion petition of Randaccio (no. 715), adding that additional support for this position is found in this Court's decision of December 16, 1968 in *Johnson* v. *Bennett,* October Term 1968, no. 32, which emphasizes the injustice of a trial Court's rulings relating to alibi when the result of such rulings is to convey to a jury, or to make possible a jury impression, that the burden of proof as to alibi may diminish a defendant's right to rely on the prosecution's failure to sustain its burden of proof under the rule of reasonable doubt.

VII

As to the issue of post-conspiracy hearsay, we contend that when the then Los Angeles-located defendants (Caci,

Cino, Sorgi—plus Calabrese) as of February 17, 1965, learned that Calabrese was being sought by the Buffalo City police for the City Hall robbery, the conspiracy later that day came to an effective end under any fair legal contemplation, and that the reception in evidence of Calabrese's testimony as to alleged happenings subsequent thereto was a violation of the post-conspiracy hearsay rule (*Lutwak* v. *United States,* 344 U. S. 604; *Fiswick* v. *United States,* 329 U. S. 211). This post-conspiracy testimony by Calabrese appears at R. 254-266, and it was especially damaging because it connoted to the jury that one or more of the defendants were maintaining an attitude of relentlessness even though their alleged conspiratorial project had been decisively thwarted.

VIII

In our Question Presented no. 10 we have challenged the Government's proofs, under the first count of the indictment (conspiracy to rob the armored car messenger), as not only insufficient, but as coming under the ban of the "no evidence" rule of *Thompson* v. *Louisville,* 362 U. S. 199, insofar as concerns proof of the interstate commerce character of checks supposed or expected to be contained in the Beverly Hilton Hotel pick-up which the conspirators were said to be planning to take by robbery. We may be mistaken in our interpretation of the Government's proof on this subject, but from our reading of those proofs it appears that those proofs consisted only of the following: (1) Government's exhibit G-38, plus testimony of the American Express Company employee Tracy (R. 1065 et seq.), which produced American Express Company checks deposited by the hotel on February 12, 13, 14 and 16, 1965 (R. 1072-1073); (2) testimony by an accountant witness, Mr. Stepien (R. 1228-1230), which yielded a "statistical" opinion that some 59 percent of the hotel's checks received from guests were drawn on out-of-State banks.

As to the American Express travelers' checks, there appears to be no proof at all for the days February 15 and February 17, which are of essential materiality under the Government's own theory as to the operative time span of the conspiracy (February 5 or 12 to February 17).

As to the other checks (out-of-State), is it possible that mere "statistical" "proof" of this sort is sufficient for criminal conviction under a charge of the present kind?

Moreover, the evidence is undisputed that no definite time whatever was set for the alleged planned robbery of the armored car messenger (count 1). This was to take place, under the Government's theory, only after the jewelry robbery of Mrs. McCune, which never came about. And if the Government is right in having been allowed to put in evidence what we above termed the post-conspiracy proofs, whereunder the defendants are depicted as having continued their conspiratorial intention even after the thwarting of the conspiracy on February 17, 1965 (when the conspirators scattered upon learning that Calabrese was "wanted" for the Buffalo City Hall robbery), then surely there is no *proved definite* time for the armored car messenger robbery, and there is no proof of the "interstate commerce" character of the contents of the armored car pouch supposititiously to be robbed.

The Government cannot have it both ways. Either the trial was unfair for failure to prove "interstate commerce" checks within a defined or reasonably limited time span, or the trial was unfair because of the reception of the prejudicial post-conspiracy proofs.

On the former alternative, the case is, as we have said, a sheer "no evidence" case; indeed, the case is a "no evidence" case on the second alternative, *a fortiori*. Indeed, further, it is a case of sheer failure to prove the requisite "interstate commerce" *corpus delicti*.

IX

As to petitioner Cino's remaining contentions (Questions Presented Nos. 11, 12, 13, 14), we respectfully rest upon all of the foregoing and upon the respective petitions of the co-petitioners herein.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ABRAHAM GLASSER,
PETER L. PARRINO,
Attorneys for Petitioner,
Stephen A. Cino.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 511—September Term, 1967.

(Argued June 18, 1968 Decided July 30, 1968.)

Docket No. 32036

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHARLES CACI, also known as BOBBY MILANO, STEPHEN A. CINO, PASQUALE A. NATARELLI, also known as PAT NATARELLI, FREDERICO G. RANDACCIO and LOUIS SORGI,

Defendants-Appellants.

Before:

MOORE and HAYS, *Circuit Judges*, and TIMBERS, *District Judge*.*

Appeals from judgments of the United States District Court for the Western District of New York, John O. Henderson, *Chief Judge*, entered on a jury verdict convicting appellants of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. §1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§371 and 2314.

Affirmed.

* Of the District Court for the District of Connecticut, sitting by designation.

PAUL IVAN BIRZON, Buffalo, New York, *for Appellant Caci.*

PETER L. PARRINO, Buffalo, New York, *for Appellant Cino.*

SALTEN RODENBERG, Buffalo, New York, *for Appellant Natarelli.*

FRANK G. RAICHLE, Buffalo, New York (Herald Price Fahringer, Buffalo, New York, on the brief), *for Appellant Randaccio.*

JOSEPH P. RUNFOLA, Buffalo, New York, *for Appellant Sorgi.*

ANDREW F. PHELAN, Assistant United States Attorney (Thomas A. Kennelly, Acting United States Attorney for the Western District of New York, Thomas H. Henderson, Jr., and Gary L. Gardner, Attorneys, Department of Justice, on the brief), *for Appellee.*

HAYS, *Circuit Judge*:

Appellants Charles Caci, Stephen A. Cino, Pasquale A. Natarelli, Frederico G. Randaccio and Louis Sorgi, were convicted, upon a trial by jury, of conspiring to commit a robbery which would affect commerce in violation of 18 U. S. C. §1951 and conspiring to transport stolen goods in interstate commerce in violation of 18 U. S. C. §§371 and 2314. We have considered the many assignments of error which have been advanced by appellants and have found no ground for reversal. The judgments of conviction are affirmed.

The indictment charged in the first count that appellants conspired to rob an armored car messenger at a Los Angeles hotel in violation of 18 U. S. C. §1951 and in the second count that appellants conspired in violation of 18 U. S. C. §371 to transport in interstate commerce proceeds from the sale of jewelry which they planned to steal from a wealthy guest at the hotel. Neither of the planned robberies was executed because the guest did not come to the hotel as expected. But for the decision of Pascal Calabrese, a co-conspirator, to "cooperate" while awaiting sentence on another charge, appellants' plans probably would never have come to the attention of law enforcement officials.

Calabrese, the chief government witness at trial, testified in great detail to the following. On December 29, 1964 Calabrese robbed the Buffalo City Hall of a substantial amount of money and immediately went into hiding. A few days later Stephen Cino contacted him at a Buffalo motel and told him that "Pat" [Natarelli] and "Freddie" [Randaccio] wished to see him. A meeting was arranged for the following evening, February 5, at Natarelli's house. When Calabrese arrived at the house he found Cino and Natarelli already there. They told him that they had "a couple of good scores" for him out of town. About a half hour later Randaccio arrived, and Natarelli and Randaccio explained their plans in detail.

Calabrese was to go to Los Angeles where he would be met by Charles Caci, an entertainer who used the stage name of Bobby Milano. A couple of days later Cino would join them. Caci would introduce Calabrese to Louis Sorgi, who was in charge of security at the Beverly Hilton Hotel. Calabrese would commit two robberies at the hotel. He would rob Mrs. Walker McCune, a frequent guest at the hotel, of her jewelry which was reputed to be worth

$400,000. Then he would rob the armored car messenger who visited the hotel to pick up the daily receipts. The jewelry would be taken by Cino to his uncle in San Francisco, who would "fence" it, and the proceeds would be returned to Buffalo.

It was agreed that Calabrese would have some friends drive him to Pittsburgh where he would get a flight to Los Angeles. At the conclusion of the meeting Natarelli and Randaccio gave Calabrese several hundred dollars for expenses.

When Calabrese arrived at the airport in Los Angeles, Caci was there to meet him. While driving from the airport to Caci's apartment they passed the Beverly Hilton, which Caci identified as the site of the "scores." Caci obtained an apartment for Calabrese in the building in which he lived. A few days later, on February 10, Cino arrived. On that evening Caci, Cino and Calabrese went to Sorgi's home where they discussed plans for the robberies. The next day Sorgi took Calabrese on a tour of the Beverly Hilton. They visited the suite usually occupied by Mrs. McCune and made a careful study of the tunnel used by the armored car messenger. Calabrese then left the hotel with Caci and Cino and went over the planned escape route. When they reached Calabrese's apartment, Calabrese commented that it was amazing that Sorgi had the keys to the entire hotel. Caci displayed a key that he said would open all the doors Sorgi had opened at the hotel.

Mrs. McCune was expected to arrive at the hotel on the following day, but she did not. For the next several days Caci telephoned Sorgi frequently to determine whether Mrs. McCune had come. On February 17 Cino received a telephone call from Buffalo and told Calabrese that his, Calabrese's, connection with the City Hall robbery was

known to the police and that he, Cino, had been instructed to return to Buffalo lest he be found with Calabrese. Cino then left for Buffalo. Five days after Calabrese surrendered to the authorities in Buffalo.

Calabrese's testimony, only the highlights of which have been summarized here, was corroborated in many details by evidence as to hotel reservations, room rentals, and the like. Evidence that Beverly Hilton passkeys had been found in Caci's possession when he was arrested on another charge provided important support for Calabrese's story.

The government introduced evidence to show that the robbery of the messenger from Armored Transport, Inc. of the pouch containing cash and checks for delivery to the United California Bank would have affected commerce. Hotel records for February, 1965 revealed that fifty-nine percent of the checks cashed at the hotel were drawn on out of state banks. During the same period 1,150 American Express Travelers Checks were cashed at the hotel. Other evidence indicated that both the bank checks and the travelers checks moved in interstate commerce in the course of collection procedures.

1. Construction of Hobbs Act

Appellants claim that the first count of the indictment should have been dismissed because the Hobbs Act, 18 U. S. C. §1951, was not intended to cover the kind of robbery they were accused of plotting. Cino contends that Section 1951 applies only to cases of extortion, although Caci is willing to concede that it might apply to "highway" robbery as well. In light of the clear wording of

the statute outlawing "robbery or extortion" [1] which affects commerce, it is not surprising that appellants spend little time on analysis of the statutory language and place primary reliance on the legislative history. However, as we recently have had occasion to observe, "the proper function of legislative history is to solve and not to create an ambiguity." *United States* v. *Blasius*, Dkt. No. 32117 (2d Cir. July 8, 1968), slip op. at p. 2992 (citations omitted).

But, in any case, the legislative history does not support appellants' position. The Hobbs Act is the successor to the Anti-Racketeering Act of 1934. Section 2(a) of the 1934 Act in substance made it unlawful to obtain or attempt to obtain money or property by the use of force or threat of force in connection with any act affecting interstate commerce. Specifically excepted from the operation of the section was "the payment of wages by a

---

1 18 U. S. C. §1951 (1964):

"Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

. . . ."

This definition of robbery was taken from the definition in the New York State statutes. See 91 Cong. Rec. 11843 (1945) (remarks of Rep. Michener); 91 Cong. Rec. 11906 (1945) (remarks of Rep. Robsion).

bona-fide employer to a bona-fide employee." In *United States* v. *Local 807, Teamsters Union,* 315 U. S. 521 (1942), the Supreme Court read the exception very broadly to include the exaction from out of state truckers by means of threats of violence of payments equivalent to union wages, when the truckers declined to employ members of the local union to drive their trucks on that portion of their routes occurring within the local's territory. The Hobbs Act was passed for the purpose of overruling this case. See H. R. Rep. No. 238, 79th Cong., 2d Sess. (1945), reprinted in U. S. Code Congressional Service pp. 1360-70 (1946). Thus, appellants are undoubtedly correct that the motive of Congress in enacting this legislation was to curb the kind of labor racketeering to which appellants would limit the reach of the statute.

However, the legislative history clearly indicates that Congress deliberately enacted a broad statute designed to apply to *all* robbery and extortion which affected commerce. The Hobbs Act was opposed by many who viewed it as specifically intended to hamper the legitimate activities of organized labor. See, e.g., 91 Cong. Rec. 11848 (1945) (remarks of Rep. Lane); 91 Cong. Rec. 11901 (1945) (remarks of Rep. Celler). In response, supporters of the measure were able to point out that its prohibitions were applicable to all individuals and groups, see, e.g., 91 Cong. Rec. 11844 (1945) (remarks of Reps. Robsion and Michener); 91 Cong. Rec. 11904 (1945) (remarks of Rep. Gwynne); 91 Cong. Rec. 11905 (1945) (remarks of Rep. Robsion), that the activities proscribed—robbery and extortion—traditionally were regarded as criminal under state law, see, e.g., 91 Cong. Rec. 11910 (1945) (remarks of Reps. Springer and Robsion), and that the borrowing of state law definitions in the statute provided assurance

that the terms robbery and extortion would not be extended beyond their established meanings, see, e.g., 91 Cong. Rec. 11900 (1945) (remarks of Reps. Hancock and Hobbs). Throughout the debates, advocates of the Hobbs bill sought to characterize it as a traditional criminal statute neutral in its application. So interpreted, the Hobbs Act plainly covers the theft contemplated by appellants.

In *United States* v. *De Sisto,* 329 F. 2d 929 (2d Cir.), cert. denied, 377 U. S. 979 (1964), we affirmed the conviction under the Hobbs Act of a defendant guilty of a crime similar to that planned by appellants. De Sisto was accused of hijacking a truck loaded with silk from Japan by means of threats of violence addressed to the driver. No elements of labor racketeering or extortion were in any way present.

Randaccio also argues that the Hobbs Act is inapplicable because checks in the possession of the armored car messenger would not yet have been moving in interstate commerce. This argument is without merit. In the first place, the language in the Act relating to interstate commerce is extremely broad, "manifesting a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence." *Stirone* v. *United States,* 361 U. S. 212, 215 (1960). It is sufficient under the Act that the proposed robbery would "affect" commerce. Furthermore, it is clear that the checks would have begun their journey in interstate commerce at least as soon as they were delivered by the hotel to the employee of Armored Transport, Inc., operator of an independent messenger service. See *United States* v. *Sherman,* 171 F. 2d 619, 622-23 (2d Cir. 1948), cert. denied sub nom. *Grimaldi* v. *United States,* 337 U. S. 931 (1949); *United States* v. *Fox,* 126 F. 2d 237 (2d Cir. 1942).

2. Accomplice Testimony

Appellant Cino attacks the sufficiency of the evidence, apparently on the ground that the uncorroborated testimony of an accomplice is insufficient to support a verdict. Although Calabrese's testimony was of crucial importance, it did not stand alone; as noted above, it was corroborated in several respects. Moreover, even if his testimony were not corroborated, it would be sufficient to support the convictions. See *Caminetti* v. *United States,* 242 U. S. 470, 495 (1917); *United States* v. *Agueci,* 310 F. 2d 817, 833 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963).

3. Effect on Interstate Commerce

Appellant Natarelli contends that the proof with respect to effect on interstate commerce was insufficient because it was limited to February, 1965 while the robbery of the messenger was not definitely scheduled for that month. However, the evidence clearly establishes that appellants intended to execute this robbery in February. The messenger was to be robbed shortly after the theft of Mrs. McCune's jewelry; Mrs. McCune was to be robbed shortly after she arrived at the hotel. And Mrs. McCune was expected to arrive on or before February 12.

4. Knowledge of Transportation in Interstate Commerce

Appellant Caci argues that there was no evidence from which the jury could conclude that he knew that the proceeds of the jewel theft were to be transported in interstate commerce. We find ample evidence from which the jury could draw this inference. Caci was intimately involved in the preparations for the theft and this fact alone provides sufficient basis for inferring that he knew how the proceeds would be disposed of. Caci knew that Ran-

daccio and Natarelli were directing the operation from Buffalo; he must have known that they would receive their share in Buffalo.

5. Charge on Defense of Alibi

Randaccio claims that the trial court erred in refusing his request for a charge as to the burden of proof on his alibi defense. We hold that, in the circumstances of this case, the failure to give the charge requested did not constitute reversible error.

The basis of the alibi defense was provided by information in government electronic surveillance logs as to Randaccio's whereabouts on the night of the alleged meeting at Natarelli's house. This information was transmitted to the jury in the form of the following stipulation:

"The government and the defendant, Frederico Randaccio stipulate that on February 5, 1965, a witness, who is not being called to testify, was in a position to overhear, but not see, certain activities in an apartment in the City of Buffalo. That apartment, occupied by a person who is not a defendant in this case, is located approximately nine-tenths of a mile from 60 Manchester Place [Natarelli's address]. At 7:50 P.M. on that evening, Frederico Randaccio was heard arriving at the apartment and talking to the occupant of that apartment. The TV, which had been turned on, was then turned up louder. Continuous loud TV ensued for the balance of the evening, during which no other sound, movement or conversation was heard indicating whether Frederico Randaccio remained or left the premises." There was also evidence that Randaccio suffered from a hearing defect the victims of which frequently turn up the volume when watching television.

Trial counsel for Randaccio sought an instruction indicating in substance that if the alibi proof when considered with the other evidence raised a reasonable doubt as to his guilt, Randaccio would be entitled to an acquittal. Apparently it was thought that such an instruction would prevent the jury from erroneously believing that the burden of establishing the alibi defense was on the defendant. However, both the manner in which this request was made and the manner of objecting to its denial gave the trial court little opportunity for the reflection and deliberation which compliance with the provisions of Fed. R. Crim. P. 30 is designed to provide.

Rule 30 requires that written requests to charge be filed at the close of the evidence "or at such earlier time during the trial as the court reasonably directs." In accordance with the trial court's instructions, counsel submitted requests in advance, including twenty-five requests on Randaccio's behalf. The trial judge informed counsel of his disposition of the requests four days before he was to charge. At that time trial counsel for Randaccio indicated that he was preparing supplemental requests which would be ready later that day. The judge stated that he wished to have them as soon as possible. The additional requests were not presented until fifteen minutes before the judge began delivering his charge. At that late hour, see *United States* v. *Olweiss*, 138 F. 2d 798, 800 (2d Cir. 1943), motion for leave to file a petition for certiorari *nunc pro tunc* denied, 321 U. S. 744 (1944), counsel submitted four additional requests, of which the alibi request was the second.

Having given the court only the barest opportunity to consider the alibi request in advance, counsel compounded the delict by inadequately objecting to the failure to charge as requested. Rule 30 requires that counsel state "distinctly the matter to which he objects and the grounds of his

objection." At the conclusion of his charge the trial judge gave the reasons for his refusal to charge the additional requests and stated, "You have, of course, an exception." Counsel presented detailed objections to other portions of the charge, but made no mention of the alibi request.

Ordinarily the failure to give an instruction on alibi defense will not be considered absent a proper request. See *United States* v. *Tramaglino,* 197 F. 2d 928, 932 (2d Cir.), cert. denied, 344 U. S. 864 (1952); *Goldsby* v. *United States,* 160 U. S. 70, 77 (1895). Assuming that in some circumstances the failure to give such a charge might constitute "plain error," see Fed. R. Crim. P. 52(a), this is hardly such a case. The alibi offered was far from compelling. Calabrese's testimony indicated that Randaccio arrived at Natarelli's place at about 8:30 or 9:00 p.m. There is nothing in Calabrese's story which is inconsistent with Randaccio's being nine-tenths of a mile away at 7:50. Under these circumstances, the court's comprehensive charge on reasonable doubt, which included the statement that the burden of proof "rests with the Government at all times" and "never shifts to a defendant," was adequate.

6. Evidentiary Rulings

Caci contends that the admission of evidence to show that certain of his recent checks had been returned for insufficient funds was prejudicial as showing the commission of other crimes. We hold that the evidence was admissible to rebut evidence of Caci's good character. Although no character witnesses were presented, Caci's counsel cross-examined Calabrese about Caci's appearances on popular television shows and introduced a brochure which included a photograph of Caci in the company of a well-known entertainer. The bad check evidence also tended to show that

Caci lacked funds and thus had a motive to participate in the planned thefts. This has particular significance in view of the testimony from which the jury might have gathered that Caci was a highly paid entertainer. Finally, it is difficult to see how this evidence could have seriously prejudiced Caci, particularly since the evidence also showed that the checks subsequently had been redeposited and paid.

Caci also argues that the Beverly Hilton passkeys found in his motel room were seized in violation of his fourth amendment rights and should not have been admitted into evidence. His argument seems to be that the trial court erred in crediting the government's witnesses who stated that Caci voluntarily admitted the police officers to the room rather than crediting Caci's witnesses who testified that the officers broke down the door. Of course we are in no position to contradict the trial judge's determinations as to the credibility of witnesses whom we have not seen. See *United States* v. *Vita*, 294 F. 2d 524, 528 (2d Cir. 1961), cert. denied, 369 U. S. 823 (1962).

It is also claimed that the officers learned of the keys through interception in violation of 18 U. S. C. §605 of a telephone conversation between one Fitzgerald and appellant Sorgi. Since Fitzgerald, the caller, gave the officers permission to listen in on the conversation, there was no violation of Section 605. See *Rathbun* v. *United States*, 355 U. S. 107 (1957).

Natarelli claims that evidence that the robbery would obstruct the interstate movement of checks was inadmissible under *Stirone* v. *United States*, 361 U. S. 212 (1960), because the indictment charged only that the robbery would obstruct the interstate movement of money. The claim is frivolous.

7. Jury Selection

Randaccio objects to several features of the jury selection process in the Western District of New York. About one-half of the names for the federal jury box are obtained from state jury lists. Concerning the prospective jurors so obtained, Randaccio has two objections: (1) the primary sources used by the state jury selectors are voter registration lists, so that non-voters are under-represented, and (2) New York law permits women to claim exemption from jury service, so that women are under-represented. Neither of these objections is substantial. It is well established that the use of voter registration lists as the source of names of prospective jurors is not unlawful because it results in the exclusion of non-voters. See, e.g., *United States* v. *Kelly,* 349 F. 2d 720, 778 (2d Cir. 1965), cert. denied, 384 U. S. 947 (1966); *United States* v. *Agueci,* 310 F. 2d 817, 833-34 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963). Indeed, voter registration lists are made the primary source of jurors in the new Jury Selection and Service Act of 1968, 18 U. S. C. A. §§1861-71 (Supp. July, 1968). As to the representation of women, it is significant that three women served on the jury which convicted appellants. Since only one-half of the federal jurors are taken from the state lists and since women are represented in substantial (albeit unequal) numbers on the state lists, the under-representation of women on the federal juries is minimal. We note also that the constitutionality of the New York statute permitting women to claim exemption has been sustained. *Fay* v. *New York,* 332 U. S. 261, 277-78 (1947). See also *Hoyt* v. *Florida,* 368 U. S. 57 (1961).

One-half of the names in the federal jury box in the Western District are selected by a federal jury commissioner using a variety of methods, including the "key-man" system. As to these, Randaccio complains that the commis-

sioner has no authority to reject jurors as unqualified except on the grounds set forth in 28 U. S. C. §1861 (1964). The jury commissioner testified that he did not place in the jury box the names of persons whose answers to a questionnaire indicated that they were of low mentality. It is arguable that Section 1861(3) specifically authorizes the commissioner to reject such persons as "incapable, by reason of mental . . . infirmities to render efficient jury service." In any event, it is settled in this Circuit that a jury commissioner has discretion under 28 U. S. C. §1864 (1964) to reject prospective jurors as not "qualified" for reasons other than those listed in Section 1861. See *United States* v. *Flynn*, 216 F. 2d 354, 386-88 (2d Cir. 1954), cert. denied, 348 U. S. 909 (1955).

8. Motion for Severance

Caci's motion under Fed. R. Crim. P. 14 for a severance in order that he might have the benefit of Sorgi's testimony in his behalf and his alternative motion for permission to inform the jury that he had attempted to call Sorgi as a witness were both properly denied. As to the former, "The argument is unrealistic. There is no reason to think that a co-defendant would be any more willing to waive his constitutional privilege against self-incrimination when called as a witness at a separate trial than he would be willing not to insist upon his privilege as a defendant not to take the stand." *Gorin* v. *United States*, 313 F. 2d 641, 645-46 (1st Cir.), cert. denied, 374 U. S. 829 (1963). And had counsel for Caci been permitted to comment on Sorgi's refusal to take the stand, Sorgi's rights under the fifth amendment would have been violated. See, e.g., *United States* v. *Echeles*, 352 F. 2d 892, 898 (7th Cir. 1965); *De Luna* v. *United States*, 308 F. 2d 140 (5th Cir. 1962), petition for rehearing denied, 324 F. 2d 375 (1963). We are aware that these cases also appear to hold that the in-

ability of a defendant to comment on a co-defendant's refusal to take the stand in a joint trial is sufficient to require a severance. Subsequent cases, however, have read *De Luna* and *Echeles* narrowly, confining their application to cases in which a defendant can show "real prejudice" if he is not permitted to comment on the silence of a co-defendant. *United States* v. *Kahn*, 381 F. 2d 824, 840 (7th Cir.), cert. denied, 389 U. S. 1015 (1967). See *Smith* v. *United States*, 385 F. 2d 34, 37-38 (5th Cir. 1967); *Kolod* v. *United States*, 371 F. 2d 983, 990-91 (10th Cir. 1967), vacated on other grounds, 390 U. S. 136 (1968); *Hayes* v. *United States*, 329 F. 2d 209, 221-22 (8th Cir.), cert. denied sub nom. *Bennett* v. *United States*, 377 U. S. 980 (1964). See also *United States* v. *McKinney*, 379 F. 2d 259, 264-65 (6th Cir. 1967). No such prejudice has been shown here.

9. Other points

The remaining contentions do not require extended comment.

a. Natarelli's claim that the second count should have been dismissed because one cannot be guilty of conspiring to transport stolen goods "knowing them to have been stolen" under 18 U. S. C. §2314 until the goods have in fact been stolen is without merit. Cf. *Williamson* v. *United States*, 207 U. S. 425, 446-47 (1908).

b. Since no objection was taken below we do not consider Cino's argument that he was deprived of his constitutional right to be present at every stage of his trial by the holding of numerous conferences in his absence in the judge's chambers. *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U. S. 907 (1966).

c. Caci contends that the district court erred in refusing to recall the jurors seven days after the verdict to learn

whether any of them had heard and had been influenced by radio broadcasts on the evening prior to and on the morning of the charge referring to three of the defendants as having been linked to the Cosa Nostra. In view of the limited character of the publicity and the repeated and detailed admonitions by the court to the jury to refrain from listening to the radio, the court did not abuse its discretion in refusing to recall the jury. Cf. *United States* v. *Hoffa*, 367 F. 2d 698, 715 (7th Cir. 1966), vacated on other grounds, 387 U. S. 231 (1967).

d. Finally, appellants raise three objections to the jury charge, none of which we find to have merit.

The court charged with respect to accomplice testimony as follows: "such testimony is to be given close and searching scrutiny and is to be received with caution and weighed with great care. You should not convict a defendant on the unsupported testimony of an accomplice unless you believe the unsupported testimony beyond all reasonable doubt." Far from being inadequate, this charge was more favorable to appellants than was required. See *United States* v. *Mattio*, 388 F. 2d 368 (2d Cir. 1968).

The court did not err in instructing the jury that a change in the form of the stolen property was not fatal in a prosecution for interstate transportation under 18 U. S. C. §2314. See *United States* v. *Walker*, 176 F. 2d 564, 566 (2d Cir.), cert. denied, 338 U. S. 891 (1949).

The instruction that the defendants need not have intended to affect commerce in order to be guilty was entirely correct. See *Nick* v. *United States*, 122 F. 2d 660, 673 (8th Cir.), cert. denied, 314 U. S. 687 (1941), cited with approval in *United States* v. *Varlack*, 225 F. 2d 665, 672 (2d Cir. 1955). See also *United States* v. *Pranno*, 385 F. 2d 387, 389-90 (7th Cir. 1967), cert. denied, 390 U. S. 944 (1968).

Affirmed.

APPENDIX B

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

As a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of July one thousand nine hundred and sixty-eight.

Present:

HON. LEONARD P. MOORE,
HON. PAUL R. HAYS,
Circuit Judges,
HON. WILLIAM H. TIMBERS,
District Judge.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES CACI, a/k/a BOBBY MILANO, STEPHEN A. CINO, PASQUALE A. NATARELLI, a/k/a PAT NATRELLI, FREDERICO G. RANDACCIO, and LOUIS SORGI,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of New York.

Appendix B

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

On Consolidation Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and and they hereby are affirmed.

A. Daniel Fusco
Clerk
By Vincent A. Carlin
Chief Deputy Clerk

APPENDIX C

Statutory Provisions Involved

Title 18 U.S.C. Section 371.

Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both . . . June 25, 1948, c. 645, 62 Stat. 701."

Title 18 U.S.C. Section 2314.

Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

"Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. . . . As amended July 9, 1956, c. 519, 70 Stat. 507; Oct. 4, 1961, Pub. L. 87-371, Section 2, 75 Stat. 802."

Appendix C

Title 81 U.S.C. Section 1951.

Interference with commerce by threats or violence.

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Pos-

session, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45. June 25, 1948, c. 645, 62 Stat. 793."

APPENDIX D

Opinion of District Judge (November 30, 1967)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

CHARLES CACI, a/k/a BOBBY MILANO, STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a PAT NATARELLI; FREDERICO G. RANDACCIO; and LOUIS SORGI.

CR. 1967-115

Prior to the trial of this case, the government acknowledged that during the period encompassed by the indictment two of the defendants were on premises which by trespass were subject to electronic surveillance by a government agency. Surveillance logs three months prior to and during the indictment period, and thereafter to cessation of surveillance, have been carefully and thoroughly reviewed by the court in camera.

Each of these defendants has an interest in determining whether or not any leads or evidence obtained through that surveillance have tainted the investigation or trial of this case. This court, of course, recognizes its duty to insure that no such taint does exist.

Initially, it should be noted that in the course of this trial the court has carefully examined the entire govern-

ment file covering the investigation and prosecution of the case. Were there the slightest doubt as to whether the contents of these logs could have produced leads or evidence helpful in the investigation or prosecution of the case, the necessity for disclosure of the logs in toto and for a full and complete hearing would be clear.

From the court's in camera scrutiny, however, the nature and contents of the logs are such that the court is fully able to certify and find beyond a reasonable doubt that no evidence or leads could have resulted from them. Satisfied that the matters contained therein are totally irrelevant and immaterial to the present investigation and prosecution, the court is mindful of the fact that a number of third parties could be affected by disclosure of the contents of these logs. Under the peculiar circumstances of this case, the court is persuaded that the interests of justice would not be served by any further disclosure.

The government staff investigating and prosecuting this case has repeatedly offered to submit proof that it was totally unaware of the contents of these logs, did not have access to them, and received nothing from anyone by reason of this surveillance which aided in the prosecution of this case. In addition, the government offers to establish the independent sources from which all information and evidence developed. In view of this offer, despite this court's findings that the contents of the logs are totally irrelevant and immaterial, the court at the request of one or more of the defendants will immediately conduct such a limited inquiry.

A demand for such an inquiry will be filed with the court no later than December 1, 1967, at 2:00 p.m.

So ordered

/s/ JOHN O. HENDERSON
John O. Henderson
United States District Judge

Dated: November 30, 1967.

APPENDIX E

Relevant Excerpts from Opinion of District Judge (October 3, 1967)

The Tape Recordings Secured by the Beverly Hills Police

On the basis of the testimony of Sergeant Egger, the court finds the conversations in question were taped with the knowledge and consent of Fitzgerald. The transcription of those tapes has been reviewed by the court and on the basis of that review the court has substantial reservations as to the materiality and relevance of the contents of those tapes to the issues raised by the indictment. The legality of their use, therefore, may become moot.

For the present, however, on the basis of *Lopez* v. *United States,* 373 U. S. 427 (1963), the court will deny the defendants' motions to suppress. In the event an offer is made by the Government, the parties should be prepared to argue the effect upon *Lopez, supra,* if any, of the Supreme Court's later decision in *Osborn* v. *United States,* 385 U. S. 323 (1966).

The Arrests of the Defendants Caci and Sorgi

On the basis of information secured from Sweeney, from investigation into illegal use of a credit card, from Fitzgerald, and from the conversations overheard by him, the court finds that Sergeant Egger had probable cause to arrest the defendant Caci and, further, that the gun, mask and keys which were secured were properly seized incidental to that arrest.

Since the statements of Sorgi to the arresting officers are to be suppressed and no further evidence is sought to be used by the Government, there is no need to consider the validity of his arrest.

APPENDIX F

Order (By Panel of Court of Appeals) Denying Petition for Rehearing (Entered October 14, 1968)

32036

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES CACI, also known as BOBBY MILANO; STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a PAT NATARELLI; FREDERICO G. RANDACCIO; and LOUIS SORGI,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellant Stephen A. Cino,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

LEONARD P. MOORE
PAUL R. HAYS
U.S.C.JJ.

WM. H. TOMKINS
U.S.D.J.

October 4, 1968

APPENDIX G

Order and Memorandum of Court of Appeals Denying Petitions for Rehearing *En Banc* (Entered December 18, 1968)

32036

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

CHARLES CACI, also known as BOBBY MILANO; STEPHEN A. CINO; PASQUALE A. NATARELLI, a/k/a PAT NATARELLI; FREDERICO G. RANDACCIO; and LOUIS SORGI,

Defendants-Appellants.

Petitions for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for appellants Charles Caci, Stephen A. Cino, Frederico G. Randaccio, and Louis Sorgi, and all the active circuit judges having voted to deny the petitions, with the exception of Judge Kaufman who votes to grant the rehearing,

Upon consideration thereof, it is

Ordered that said petitions be and they hereby are denied.

Judge Kaufman votes to grant a rehearing in banc for the sole purpose of deleting the sentence in the panel

opinion reading, "In any event, it is settled in this Circuit that a jury commissioner has discretion under 28 U.S.C. §1864 (1964) to reject prospective jurors as not 'qualified' for reasons other than those listed in §1861. See United States v. Flynn, 216 F. 2d 364, 386-88 (2d. Cir. 1954), cert. denied, 348 U.S. 909 (1955).", Slip Sheet at 3301, because it might be misconstrued as approving a grant of discretionary power to clerks or jury cimmissioners to select jurors. In place of this sentence, Judge Kaufman would insert the following: "The methods used to select the jury here did not result in any denial of liberty without due process of law or prejudice to the defendants."

J. Edward Lumbard
Chief Judge